Many providers could be swept up in regulatory initiatives and developments unintentionally, because, as discussed above, the Internet precludes bright-line distinctions among providers and networks; the effects will be just as harmful even if regulators do not intend them. As the Commission has repeatedly recognized, regulatory uncertainty undermines the incentives of all prospective providers to design and deploy new offerings that exploit the Internet's potential as a mode of communications. Most recently, Chairman Powell stated, "As the Internet continues to command a central position in communications and in commerce, the lurching assertions of different regulatory regimes could threaten its very viability and could severely, if inadvertently, undermine the efficient development of national economic opportunity."[51] By contrast, "a stable and predictable federal regulatory environment . . . is conducive to continued investment . . . and minimiz[es] regulatory uncertainty and any consequent chilling of investment activity."[52]

The Internet environment is now awash with confusion among both consumers and investors. Commissioners Copps's observations about VoIP are equally applicable to IP platform services generally:

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51 *Id.*

52 Second Report and Order, *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1421 ¶ 25 (1994); *see also Cable Modem Order* at 4802 ¶ 5 ("[W]e seek to remove regulatory uncertainty that in itself may discourage investment and innovation."); Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019, 3022 ¶ 5 (2002) ("*Title I NPRM*") (the Commission's "policy and regulatory framework will work to foster investment and innovation in these networks by limiting regulatory uncertainty and unnecessary or unduly burdensome regulatory costs"); *Triennial Review Order*, Separate Statement of Chairman Michael K. Powell at 17519 (the absence of "clear and sustainable rules" may result in "a molten morass of regulatory activity that may very well wilt any . . . investment interest . . . .").

> Question marks have haunted VoIP for too long. Consumers are confused. They need to know what they can expect if they sign up for this new service. Investors and carriers are wary. They need to know in this capital intensive industry how to plan for the networks of the future. I think we all understand that we do no favors to anyone if we sit back and practice benign neglect. It's both pro-consumer and pro-business for the Commission to bring clarity to this dialogue.[53]

In Commissioner Adelstein's words, "It's time for us to take the lead in getting the regulatory structure right from the start. We should provide clarity and guidance for all who are entering or thinking to enter this space . . . ."[54] The Commission should establish this clarity now by declaring affirmatively that IP platform services are categorically exempt from legacy economic regulation.

SCOPE OF PETITION

To implement Congress's expansive mandate "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services,"[55] the Commission will first need to describe the scope of the services that fit under its umbrella of unregulation. Nearly a quarter century ago in the *Computer Inquiries*, the Commission recognized the wisdom of establishing a broad category of services that need not, and should not, be subject to traditional regulation.[56] By doing so, the Commission eschewed a time-consuming,

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53 *Copps VoIP Forum Remarks.*

54 "Statement of Commissioner Jonathan S. Adelstein, Voice over IP Forum" (rel. Dec. 1, 2003).

55 47 U.S.C. § 230(b)(2).

56 *See Computer II* at 423 ¶ 101 (recognizing the benefits of "draw[ing] a clear and . . . sustainable line . . . upon which business entities can rely in making investment and marketing decisions" and "remov[ing] the threat of regulation from markets which were unheard of in 1934 and bear none of the important characteristics justifying the imposition of economic regulation by an administrative agency.").

case-by-case regulatory approach, and instead gave the communications industry a relatively stable, well-defined regulation-free zone within which to develop innovative new products and services that have provided incalculable economic and social benefits to our nation.

In this section of the petition, we identify the scope of the services that should be subject to unregulation in the Internet era. This category of services (and the underlying IP platforms) — which we refer to collectively as "IP platform services" — fits squarely within Congress's vision that the "Internet and other interactive computer services" should exist "unfettered by Federal or State regulation."[57] We begin with a brief description of the key principles that guide our formulation of the scope of IP platform services. We next provide a specific description of these services, as well as the providers who offer them and the platforms over which they are provisioned. We then discuss some examples of the services that should be considered IP platform services and, just as important, the services that should not.

In identifying the scope of IP platform services, we are also mindful of the Commission's need to achieve important public policy goals, such as promoting universal service, public safety, assistance to law enforcement, and disability access. As explained further below, we believe that our proposal will allow the Commission to fence IP platform services off from unnecessary legacy regulations while leaving the Commission with solid authority to continue to meet its

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[57] Congress defines the Internet broadly in the Act. *See* 47 U.S.C. § 230(f)(1) (defining the Internet as "the international computer network of both Federal and non-Federal interoperable packet switched data networks"); *id.* § 230(f)(2) (defining interactive computer service to include "any information service, system, or access software provider . . . including specifically a service or system that provides access to the Internet . . . ."); *id.* § 231(e)(3) ("The term 'Internet' means the combination of computer facilities and electromagnetic transmission media, and related equipment and software, comprising the interconnected worldwide network of computer networks that employ the Transmission Control Protocol/Internet Protocol or any successor protocol to transmit information.").

critical policy goals as the communications industry evolves towards pervasive reliance on the IP format.

1. *Principles Guiding the Definition of IP Platform Services*

In describing the scope of IP platform services, the Commission should follow three key principles: (a) the defined category should be broad and inclusive; (b) it should have bright-line boundaries; and (c) its definition should be competitively neutral. Each of these principles is discussed below.

a) *Broad Scope*

As mentioned above, unlike the closed, circuit-switched world of the past, the competitive IP world of today allows a multitude of services to flow seamlessly over a single IP platform. An individual IP packet could be part of a web page, an e-mail, a music video, a voice transmission, or some other form of communication. Thus, the scope of IP platform services should be broad enough to encompass the full range of services that ride the IP platform so as to be faithful to Congress's vision that the Internet and other interactive computer services shall exist unfettered by federal or state regulation.[58]

If the scope of IP platform services subject to nonregulation were to be narrowly prescribed to exclude a particular IP service, which would then be subjected to traditional economic regulations, those regulations would invariably affect all of the other services sharing the IP platform. There is no practical and efficient way to segregate individual IP packets for

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[58] *See* 47 U.S.C. § 230(b)(2).

individualized regulatory treatment.[59] Thus, to provide a meaningful opportunity for experimentation, innovation, and growth, the Commission should define IP platform services broadly and inclusively.

b) *Bright-Line Boundaries*

Perhaps the most significant concern expressed recently by the communications industry is the lack of certainty surrounding the regulatory treatment of new products and services — uncertainty that currently is increasing, as described above. This lack of regulatory certainty slows business decisionmaking, impedes investment, increases costs, and can delay or even prevent the introduction of new products and services into the marketplace. By contrast, the creation of an unregulated space for IP platform services with bright-line boundaries that are clearly articulated and easily understood would provide the industry with a stable foundation on which to attract capital and develop innovative services.

Bright-line boundaries for IP platform services also would substantially reduce the need for the Commission to spend its limited resources in multiple case-by-case regulatory determinations each time a new IP platform service is introduced or a new "bell or whistle" is added to an existing service. Thus, the scope of IP platform services should avoid reliance on fine technical distinctions that may rapidly become obsolete as communications technologies continue to evolve. Rather, the definition of IP platform services should feature an easily

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[59] Even if it were practical to check individual packets to determine which ones were VoIP packets, that would still subject the non-VoIP packets to an inspection, and to the attendant performance degradation associated with that inspection, merely because they ride the same platform as the VoIP packets.

understood functional description of the services' key attributes so that providers and regulators alike can tell when a given service qualifies as an IP platform service.

c) *Competitive Neutrality*

One of the greatest attributes of the Internet is the open competition it has fostered among communications services and providers that once resided in isolated regulatory silos. As described above, the Internet marketplace and, more broadly, the market for services that run on IP, are characterized by low barriers to entry and high levels of competition. Service providers of all shapes and sizes compete fiercely without the need for government intervention. To maintain this intense and highly productive competition, the scope of IP platform services must be defined without regard to outdated legacy distinctions between service providers or the services they seek to offer. The market for IP platform services should be open to all competitors, who should all be subject to the same regulatory treatment in the provision of these services.

As described above, the highly modular nature of the Internet enables service providers to focus on one specific aspect of IP services (such as software). This presents end users with varied choices between (i) obtaining particular components (*e.g.*, software, customer premises equipment ("CPE"), broadband services) from individual providers and managing their own networks, or (ii) purchasing wholly or partially assembled IP platform services from one or more service providers. Regulatory treatment of the service capabilities the end user obtains should be neutral as between these choices.

Further, the Commission should reaffirm that participants in the Internet marketplace will enjoy no special regulatory advantages or disadvantages because of their status as "carriers" or as noncarrier suppliers of software, equipment, or services. Today, for example, all Internet

backbone providers are treated equally with respect to the "unregulation" of the Internet — even if they are also providers of legacy telecommunications services — and this is as it should be. Even if it were possible to draw lines among providers, the impact would be disruptive and unworkable. Consider, for example, the increased uncertainties and added complexities that would be associated with establishing customized QoS capabilities across multiple IP networks if one provider were subject to requirements or constraints to which the others are not. This would diminish the existing flexibility of network providers to tailor new arrangements. It would also ultimately either put the government in the position of regulating the Internet as a whole, or make it impossible to ensure interoperability: In order to ensure the same level of QoS across the entire path of an Internet communication, all providers would have to engineer and design their facilities and services to meet standards imposed on the subset that is targeted for regulation, or that subset would be shut out entirely, because it would be unable to participate in the QoS standards adopted by the rest of the industry. Thus, regulating one group or portion of the Internet will result in the regulation of all of them, or the severing of the regulated subset from the market.

2. *IP Platform Services*

a) *Scope of Services, Providers, and Platforms*

Consistent with these principles, the Commission should declare that "IP platform services" consist of (a) IP networks and their associated capabilities and functionalities (*i.e.*, an IP platform), and (b) IP services and applications provided over an IP platform that enable an end user to send or receive a communication in IP format. The communication may be voice, data, video, or any other form of communication, so long as it is sent to or received by an end user in IP over an IP platform. This definition is expansive in that it encompasses the IP

networks themselves and the uses to which these networks are put. It also encompasses both "services" and "applications," since the distinctions between these concepts are meaningless for regulatory purposes in the IP context. Instead, the key characteristic of an IP platform service is that the service must leave or reach the customer in IP over an IP platform.

A ruling that encompasses not only IP-based services but also the IP-enabled networks over which they are provided is necessary in order to create a rational, deregulatory framework for the Internet. The Internet is, at bottom, a collection of IP platforms. The quality and range of IP-based services are directly linked to those underlying platforms. As a result, Title II regulation of those networks would necessarily affect the myriad products, services, and applications that are part and parcel of these IP platforms, and vice versa. In fact, because the IP routers and facilities used for IP-based services are also often used for the "best efforts" public Internet, regulation of individual IP-enabled networks and subnetworks could quite possibly lead to regulation of the Internet as a whole. It also is important, as noted, not to establish artificial distinctions based on whether an IP service provider is a network-based or an application-based provider.

Furthermore, the Internet's future development is dependent on innovation at *both* the service and the facility levels. Therefore, the Commission must ensure that IP-based services as well as the IP-enabled facilities over which they are provided are allowed to evolve without regulatory restraint. This action is necessary to promote IP technology integration and evolution at both the network and service levels. Any other approach would simply be incomplete, and would not permit the full potential of IP platform services to be realized.

The touchstone for identifying IP platform services should be that the service reaches or leaves the end user in IP format. This focus on the functionality afforded the end user is

consistent with the Commission's repeated recognition that the regulatory treatment of a particular service turns on the nature of the service as delivered to the end user.[60] IP platform services are fundamentally characterized (and distinguished from traditional legacy services) by the fact that they are either sent to or received by an end user in IP format. It is only in these circumstances — and not when an end user receives a communication in circuit-switched format — that the end user can tap into the enormous functional capabilities of the IP platform. The Commission's definition of these services therefore should account for this defining feature of IP platform services.

The Commission also should make clear that IP platform services include the relevant offerings provided by *any* type of communications provider, including telephone companies, cable companies, wireless providers, satellite companies, powerline companies, ISPs, or any other type of entity (whether or not a "carrier"). These providers should be free to choose to offer IP platform services on an individualized basis to a select group of customers, or they may offer services indiscriminately to any customer. And they may use any type of IP facilities or networks to do so, without changing the regulatory classification of the IP platform service. Nor should it matter whether the provider uses copper, coaxial cable, fiber, spectrum, or any other medium. As long as the service provided affords the customer the ability to send and/or receive communications in IP, the service should be treated as an IP platform service.

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60 *See, e.g., Report to Congress* at 11530 ¶ 59 ("[I]f the user can receive nothing more than pure transmission, the service is a telecommunications service. If the user can receive enhanced functionality, such as manipulation of information and interaction with stored data, the service is an information service."); *see also* 47 U.S.C. § 153(20) (defining an information service based on what "capability" is "offer[ed]").

As discussed above, the Commission also should resist calls to distinguish between IP platform services that ride over the "public" Internet on the one hand and "managed" IP networks on the other.[61] That distinction is already vague and will become increasingly meaningless in coming years. As explained, the principal distinction between a "public" and a "managed" IP network has been the latter's greater ability to manage traffic flows and thereby provide QoS guarantees to the user.[62] The distinction between "public" and "managed" IP networks will blur or disappear as improved QoS capabilities increasingly allow the creation of virtual private networks on the public Internet. Any attempt to base regulatory distinctions on a supposed public/managed dichotomy would almost certainly become obsolete as technology continues to develop. And, as with differentiating between types of carriers, regulations and distinctions among networks either would be impossible to sustain, leading to regulation of all networks, or would isolate one type of network from others, thus destroying the interoperability and seamlessness that are hallmarks of the Internet.

b) *Examples of IP Platform Services*

A quintessential example of an IP platform service is an IP-based virtual private network ("IP-VPN") — a service that allows a user to realize the cost advantages of a shared IP network, while enjoying the same security, reliability, QoS, and manageability as if operating its own

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61 *See Cable Modem Order* at 4799 ¶ 1 n.1 (defining "the Internet" to include any IP information system that "provides, uses or makes accessible, *either publicly or privately*, high level services layered on the communications and related infrastructure described herein") (emphasis added); *Report to Congress* at 11531-32 ¶ 63 ("many of the networks connected to the Internet are 'intranets,' or private data networks, that offer better performance or security to a limited set of users, but can still communicate with the Internet using IP").

62 The routers and links used to provide "best efforts" services over the public Internet are in many cases the same routers and links used to provide managed IP services.

network. An IP-VPN service is delivered to the customer in IP format. IP-VPN capabilities can be provided through CPE or via an IP service provider's network, illustrating again why it is important not to differentiate between technological solutions. Another classic example of an IP platform service is a VoIP service provided over a broadband connection that enables the calling party to send its communication in IP.[63]

In addition to enabling a customer to communicate with other IP platform service subscribers, some IP platform services may enable a customer to communicate with a user of a *non*-IP platform service, for example, a subscriber to plain old telephone service on the PSTN. In these situations, the "calling" customer's IP communications will have to be converted at some point to a non-IP format before they can be delivered over the PSTN. The IP platform service used to send the communication remains an IP platform service despite this conversion. At the same time, as soon as a communication is handed off to the PSTN, the rules applicable to PSTN communications should apply.[64]

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[63] Broadband Internet access service is yet another example of an IP platform service. By purchasing broadband Internet access service — in the form of cable modem service, digital subscriber line service, satellite broadband service, wireless broadband service, or any other broadband service — a customer obtains the ability to communicate with others in IP. The customer may browse the world wide web, send and receive e-mail, download and upload files, and engage in countless other communications all sent and received by that customer in IP.

[64] By the same token, if the service provided to the customer is a PSTN service at both ends, and the customers on each end are not provided the ability to send and/or receive communications in IP, then the service is not an IP platform service, even if the service provider uses IP transparently in the provision of the service. For example, if a service provider offered non-IP platform services to two customers but transparently converted all traffic to IP for transmission on its own IP platform, the intermediary IP transmission does not change the nature of the non-IP platform services provided to the two customers. The same result would hold if the intermediary IP transmission were performed by a third party.

These are just a few examples of the IP platform services available today or likely to be available in the future. As the use of IP continues to grow, new IP services will be developed, new IP platform architectures will be designed, and new business relationships will be formed between providers of IP platform services. Rather than wait to address these services on a piecemeal, case-by-case basis, the Commission should affirmatively declare that, consistent with Congress's vision, a broad, bright-line, and competitively neutral category of IP platform services will be permitted to flourish "unfettered by Federal or State regulation."

DISCUSSION

In order to determine the proper regulatory treatment for any new service, the Commission must first ask whether that service is subject to its jurisdiction under Title I, which covers all "interstate communications." If a service qualifies as an interstate communication and thus falls within the Commission's exclusive jurisdiction under Title I, the Commission must then ask whether that service also meets any of the criteria that would subject it to any of the additional substantive Titles of the Act — Title II for telecommunications services, Title III for broadcast and other services using the radio spectrum, and Title VI for cable services.

Under this analytical framework, IP platform services clearly fall into the Commission's exclusive jurisdiction under Title I, because they are categorically "interstate" in character and are "communications by wire" or "by radio." The Commission thus may preemptively oversee IP platform services under Title I, and may apply any public policy regulations it finds necessary under that framework. The Commission should declare that IP platform services do not fall within Title II or any other substantive Title in the Act, even though certain service applications may share some attributes with services that fall within those Titles. Further, to eliminate all uncertainty about the unregulated status of IP platform services, the Commission should exercise

its authority under Section 10 of the Communications Act to forbear from any Title II regulation that might be argued to otherwise apply to these services or particular applications of them, including specifically the *Computer II* requirements.[65]

I. THE COMMISSION SHOULD CONFIRM THAT IP PLATFORM SERVICES ARE CATEGORICALLY INTERSTATE COMMUNICATIONS AND ARE THUS SUBJECT TO THE COMMISSION'S EXCLUSIVE JURISDICTION UNDER TITLE I.

IP platform services are communications by wire or radio that, by virtue of the dispersed nature of the Internet itself, are inherently interstate. It is practically infeasible, if not impossible, to identify a segregable intrastate component of a communication provided using an IP platform service. As a result, IP platform services fall within the Commission's exclusive regulatory jurisdiction under Title I of the Act. To the extent certain public policy objectives must be met in connection with IP platform services, the Commission has the authority to impose individual regulatory requirements on IP platform services under Title I.

A. IP Platform Services Are Inherently Interstate Communications by Wire or Radio, With No Identifiable Intrastate Component.

The Communications Act gives the Commission broad jurisdiction over "all interstate and foreign communication by wire or radio."[66] The Act defines "communication by wire" as "the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services . . . incidental to such

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65 As noted above, SBC has separately filed a petition for forbearance as required by 47 C.F.R. § 1.53.

66 47 U.S.C. § 152(a).

transmission," and "communication by radio" as "the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission."[67] As discussed above, the myriad IP platform services fit one or the other or both definitions.

As the Commission has consistently recognized, the Internet itself is inherently interstate. The Internet is "an international network of interconnected computers enabling millions of people to communicate with one another and to access vast amounts of information from around the world."[68] Applications provided over the Internet "involve computers in multiple locations, often across state and national boundaries."[69] As a result, "In a single Internet communication,

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67 *Id.* §§ 153(52), (33).

68 Memorandum Opinion and Order, *GTE Telephone Operating Cos.*, 13 FCC Rcd 22466, 22468 ¶ 5 (1998) ("*GTE Order*"); *see also Cable Modem Order* at 4799 ¶ 1 n.1 (defining "the Internet" as a "global information system"). The Commission in the *Computer Inquiries* reached a similar conclusion that enhanced services generally constitute the transmission of signals "over the interstate telecommunications network and, as such, fall within the subject matter jurisdiction of this Commission." *Computer II* at 432 ¶ 125.

69 Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 16 FCC Rcd 9151, 9178 ¶ 58 n.115 (2001) ("*ISP Remand Order*"), *remanded sub nom. WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. denied sub nom. Core Communications, Inc. v. FCC*, 123 S. Ct. 1927 (2003). For example, a "single web address frequently results in the return of information from multiple computers in various locations globally":

> [O]n a sports page, only the format of the webpage may be stored at the host computer in Chicago. The advertisement may come from a computer in California (and it may be a different advertisement each time the page is requested), the sports scores may come from a computer in New York City, and a part of the webpage that measures Internet traffic and records the user's visit may involve a computer in Virginia. If the user decides to buy something from this webpage, say a sports jersey, the user clicks on the purchase page and may be transferred to a secure web server in Maryland for the transaction.

an Internet user may, for example, access websites that reside on servers in various state[s] or foreign countries, communicate directly with another Internet user, or chat on-line with a group of Internet users located in the same local exchange or in another country, and may do so either sequentially or simultaneously."[70] The Commission has recognized that "[m]ost Internet-bound traffic traveling between a LEC's subscriber and an ISP is indisputably interstate in nature when viewed on an end-to-end basis."[71] Furthermore, the highly dispersed nature of the facilities necessary to complete an Internet communication renders any attempt to identify an intrastate component of each such communication nearly impossible. Thus, to the extent that an Internet communication has an intrastate component, it is obscured by the very nature of the Internet.

These features of the Internet are shared by IP platform services. IP platform services rely on the same dispersed networks that comprise the Internet, and therefore the services (and underlying IP platforms) provide the capability to interact with a multitude of information sources in different jurisdictions during a single communication. The key enabling equipment for IP platform services (such as web servers or soft-switches) will in many cases be located

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Id. at 9178 ¶ 58.

70 *GTE Order* at 22478-79 ¶ 22.

71 *ISP Remand Order* at 9178 ¶ 58. The D.C. Circuit subsequently remanded the *ISP Remand Order* on the ground that the Commission had inadequately explained why dial-up Internet-bound traffic falls outside the scope of the "reciprocal compensation" provision of section 251(b)(5). *See WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). But neither in that decision nor in the D.C. Circuit's previous decision on reciprocal compensation did the court express any doubt about the Commission's end-to-end basis for exercising exclusive *jurisdiction* over such traffic. *See Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 5 (D.C. Cir. 2000) ("[t]here is no dispute that the Commission has historically been justified" in employing an end-to-end analysis to treat Internet-bound traffic as interstate, even for dial-up Internet access terminating at a local modem bank).

outside the state in which a particular user is located. When end users use IP platform services to communicate with each other, the interstate nature of the Internet is engaged no matter where the end users are physically located. Consider, for example, a computer-to-computer VoIP call between two end users located in buildings on the same block in downtown Washington, D.C. Even though each end user is physically located in the same jurisdiction, the transmission, storage, and processing of their e-mails are likely to involve servers located in other states.

As with the Internet, isolating a discrete intrastate component of an IP platform service to justify the exercise of state jurisdiction would be difficult if not outright impossible. On traditional telephone networks, it generally is possible to determine whether a call is interstate or intrastate because a single carrier provides a physical connection to the end user. But the technology underlying IP platform services renders the notion of an "intrastate" call almost meaningless. As convergence continues, a data stream may simultaneously include packets (consisting of voice, data, video, or some combination thereof) bound for points both in and outside any given state. But because there is no feasible way for carriers to track, on a bit-by-bit basis, the exact content or routes of those packets on an IP platform,[72] it would be impracticable, as well as inimical to the technological premise of the Internet, to separate out any discrete, "intrastate" components of that data stream.[73]

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[72] Routing of IP traffic is based on matching a numeric IP address to a particular device, such as an end user's computer, a router, or a server, to name a few, rather than a geographic destination.

[73] *See Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 543 (8th Cir. 1998) (observing that "the services provided by ISPs may involve both an intrastate and an interstate component and it may be impractical if not impossible to separate the two elements"); First Report and Order and Further Notice of Proposed Rulemaking, *Promotion of Competitive Networks in Local Telecommunications Markets*, 15 FCC Rcd 22983, 23031-32 ¶ 107 (2000) ("Because fixed

Such tracking theoretically could be "possible," if one embraces the principle that with enough time and money *anything* is possible from a technological perspective. But there is no *service-driven* reason for committing those resources to develop such tracking capabilities. In a dynamic, competitive industry, it makes little sense to devote dollars to developing useless, inefficient technological capabilities that would improve neither service nor efficiency. But this is precisely what would be required to try to break the integrated flow of traffic on the Internet down into jurisdictional chunks. The ramifications of such an effort would almost certainly be significant and negative for the development of new and innovative IP services and applications.[74]

The difficulty of delineating the interstate and intrastate portions of an Internet communication would be compounded by the increasingly portable nature of IP platform service offerings. End users can take their laptops to any location but "virtually" remain in their home office. Consider again two end users in Washington, D.C. One may take his laptop to San Francisco while keeping in e-mail contact with his acquaintance back in Washington, D.C., who may not even know that his correspondent has flown to the other side of the country. And VoIP permits telephone calls to be placed with the same geographical indifference: Depending on the

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wireless antennas are used in interstate and foreign communications and their use in such communications is inseverable from their intrastate use, regulation of such antennas that is reasonably necessary to advance the purposes of the Act falls within the Commission's authority."); *see generally Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986) (addressing FCC's jurisdiction "where it was not possible to separate the interstate and intrastate components of the asserted FCC regulation").

[74] If a communication begins and ends on the PSTN, however, its geographic origin and destination can be tracked — even if the communication is converted to IP for transmission between those points on the PSTN.

particular service used, a user can plug his phone into any broadband connection anywhere in the country, and the call will appear to be placed from the user's chosen area code. In this regard, IP platform-based communications can be analogized to wireless calls, which (for the most part) also fall within the exclusive regulatory jurisdiction of the federal government.[75] It would be nonsensical, as well as impractical and cumbersome, to develop regulations for IP platform services that hinge on the physical location of the sender or recipient of those services.[76]

Reaffirmation of the inherently interstate nature of IP platform services — and thus of the Commission's exclusive authority over them — is not only legally appropriate, but competitively critical. Investors and developers putting together a global network of networks cannot operate within a patchwork of myriad different state rules (and different frameworks for the applicability of those rules). The Internet's infrastructure ignores state boundaries, and the routing of IP traffic is specifically designed, for efficiency's sake, to transcend geographic distinctions and the necessity for fixed point-to-point routing. If states are permitted to impose regulatory requirements on IP platform service providers, those providers may, within a moment's time,

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75 *See* 47 U.S.C. § 332(c).

76 Because IP platform services, as defined above, originate and/or terminate in IP format, one cannot practicably segregate an intrastate component of these services for jurisdictional purposes. Nevertheless, when IP platform services originate as circuit-switched traffic on the PSTN (and terminate in IP) or, after originating in IP format are converted to circuit-switched traffic and terminate over the PSTN, there is no reason that intrastate access cannot and should not be taken into account in the assessment of intercarrier compensation. For example, the impracticability of tracking the flow of IP platform services traffic for jurisdictional purposes does not mean that circuit-switched service providers cannot use information they obtain from IP providers, such as calling party number information, for use in assessing appropriate access charges. As discussed *infra*, any changes in intercarrier compensation should be addressed in the intercarrier compensation proceeding. *See infra* for a discussion of access charges.

find that the entire regulatory landscape under which it operates has shifted dramatically. This risk can only deter innovation and investment.

Finally, because the Internet is global in scope, Commission primacy within the United States is necessary to enable this country to continue to exercise leadership in shaping the policies that will govern the Internet worldwide. The United States has traditionally led other nations in the development of Internet-based applications, and a definitively deregulatory national policy will both set an example for the world and establish the conditions under which United States entrepreneurs can continue to lead internationally.

This last point has urgency of its own. Other nations are quickly gaining ground on the United States by taking affirmatively deregulatory positions with respect to the Internet. For example, Japan has recently adopted deregulatory measures for IP platform services that have enabled broadband penetration to increase sevenfold over a two-year period, to reach a level roughly equivalent to that in the United States.[77] Perhaps most notably, the South Korean government has consistently pursued a "hands-off" policy with respect to the Internet,[78] which has helped it to lead the world in broadband deployment.[79] Such developments not only undermine the status of the United States as the perceived leader in international Internet policy,

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[77] *See, e.g.*, Phred Dvorak, *New Connections: A Web Maverick Sparks Revolution In Wiring Japan*, Wall St. J. (Oct. 17, 2003) ("Japan had 11.8 million high-speed Internet subscribers as of August, up more than sevenfold from 1.6 million two years earlier. That gives it a broadband penetration rate of almost 10%, around U.S. levels.").

[78] *See* Kyounglim Yun *et al.*, *The Growth of Broadband Internet Connections in South Korea: Contributing Factors* at 10, Asia/Pacific Research Center (Sept. 2002) ("South Korea is considered to have one of the most liberalized telecommunications sectors in Asia.").

[79] *See id.* at 11 ("It has been widely reported that South Korea is the most wired country in terms of broadband.").

but also may threaten the Internet-based economy in the United States by inducing providers of IP platform services to relocate their facilities to countries with more hospitable regulatory environments.[80] To maintain the U.S. position of primacy and avoid the economic consequences of inaction, the Commission should act now to reestablish itself and the United States as a leader in Internet unregulation.

B. Under Its Title I Authority, the Commission May Craft Any Regulations That May Be Necessary and Appropriate for IP Platform Services.

As Chairman Powell noted recently, a new approach to IP services does not necessarily mean "no regulations . . . . It means the right regulations for this service."[81] It will be increasingly important, for example, to consider appropriate means of addressing such concerns as E911 capabilities, communications assistance to law enforcement, universal service, and access for persons with disabilities.

Title I affords the Commission ample authority to address these concerns. In designing the Communications Act in 1934, "Congress sought 'to endow the Commission with sufficiently elastic powers such that it could readily accommodate dynamic new developments in the field of communications.'"[82] Title I embodies the "'comprehensive mandate'" that Congress gave the Commission to enable it to manage developments in "a field that was demonstrably 'both new

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80 *See, e.g.*, Comments of Michael Gallagher, Assistant Acting Secretary, U.S. Department of Commerce, FCC Forum on Voice over Internet Protocol (VoIP) (Dec. 1, 2003).

81 *Powell Internet Remarks.*

82 *Computer & Communications Indus. Ass'n*, 693 F.2d at 213 (quoting *General Tel. Co. v. United States*, 449 F.2d 846, 853 (5th Cir. 1971)).

and dynamic.'"[83] Emerging IP platform services are exactly the sort of "new and dynamic" development that Congress envisioned the Commission would face the need to consider and for which it provided the requisite authority under Title I. Indeed, the Commission has previously recognized its regulatory authority under Title I.[84]

The regulatory flexibility afforded by Title I is particularly important given the collaborative industry efforts already underway to deal with these very issues in the context of IP platform services. For example, industry representatives are already meeting to develop solutions to the more pressing public safety and consumer protection issues posed by emerging IP technologies, such as the needs of law enforcement and public safety (*e.g.*, communications assistance to law enforcement and E911). The Commission should coordinate and encourage these collaborative processes and use its Title I authority to craft a uniform policy framework. Specifically, the Commission should conduct a rulemaking to consider whether any particular public policy mandates would be appropriate for IP platform services, including any that might be similar to those currently applied under Title II. This will create an open forum in which all interested parties, including the states, may discuss the future regulation of IP services. But that dialogue should proceed pursuant to unifying principles set at the *federal* level.

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83 *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 173 (1968) (quoting *National Broad. Co. v. United States*, 319 U.S. 190, 219 (1943)).

84 *See, e.g.*, Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, 16 FCC Rcd 6547, 6610 ¶ 148 (2001) ("*AOL/Time Warner Merger Order*") (concluding that IM services are communications by wire and/or radio and thus that "new IM-based services . . . are subject to our jurisdiction under Title I of the Communications Act"); *see also Cable Modem Order* at 4839-40 ¶ 72; *Southwestern Cable*, 392 U.S. at 173.

II. THE COMMISSION SHOULD DECLARE THAT IP PLATFORM SERVICES ARE NOT SUBJECT TO TITLE II PROVISIONS APPLICABLE TO TELECOMMUNICATIONS CARRIERS.

Having determined that IP platform services do fall within the Commission's regulatory jurisdiction under Title I, the Commission should declare that they do *not* also fall within Title II. IP platform services are inherently information services (and can be expected even more clearly to fall within that category in the future), and they are also private carriage. As we discuss, a determination that they fall outside Title II will not disturb the application of the competitive safeguards that Congress and the Commission have created to ensure access to legacy transmission networks.

A. IP Platform Services Do Not Fall Within Title II of the Act.

A defining characteristic of IP platform services is that they transcend the service categories that define the scope of the substantive titles of the Communications Act. The Act was written at a time when, for the most part, particular *services* were tightly linked to particular *facilities* and the facilities were owned by monopoly or near-monopoly providers. Those providers were made subject to disparate regulatory regimes codified in the Act's service-specific Titles (telephone companies were subject to Title II, broadcasters to Title III, and cable companies to Title VI). The IP platform obliterates those old regulatory assumptions, freeing particular services and applications (such as web browsing, e-mail, voice, or streaming video) from the need to run on dedicated physical facilities. As a result, end users can use the Internet platform — and its multiplicity of underlying networks — for services and applications that look like "telecommunications services" regulated under Title II (for example, certain forms of VoIP); broadcast services regulated under Title III (for example, streaming audio and video); and cable services regulated under Title VI. If the regulatory treatment of IP platform services was determined on the basis of how some of the characteristics of these services appear in isolation,

they could be classified under any of these substantive Titles. But that would be inappropriate and counterproductive.

It is more accurate to view IP platform services as "information services," which the Commission has recognized are properly treated under Title I. The heart of an IP platform service is the provision of an information and communications management tool — a means of fusing computing power and communications. Use of an IP platform to provide a service that originates or terminates in IP intrinsically offers "a *capability* for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[85] IP platform services thus bear attributes of information services no matter what the individual application. "[I]f the user can receive nothing more than pure transmission, the service is a telecommunications service. If the user *can receive* enhanced functionality, such as manipulation of information and interaction with stored data, the service is an information service."[86]

The latter description fits today's and tomorrow's IP platform services. In fact, if anything, IP platform services will fall within the "information services" category of the Act even more clearly as they develop. For example, IP platform services being introduced today allow customers to control many aspects of their communications directly from their desktop — a dramatic change from centrally controlled telecommunications networks. And these services are evolving toward even greater integration of voice, data, and video applications, affording both providers and customers greater flexibility and value. In a recent study of the priorities of

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85 47 U.S.C. § 153(20) (emphasis added).

86 *Report to Congress* at 11530 ¶ 59 (emphasis added).

service providers, providers listed "managed services," "IP networking," and "converged services" as the kinds of services and applications they viewed as most likely to be productive in the future.[87] This trend is not surprising, given that the nature of innovation is to go beyond the capabilities of existing services. In light of this, it will be increasingly clear over time that all IP platform services offer capabilities that place them in the information services category. The Commission should take this evolution of IP platform services into account in declaring that these services are inherently information services.

The fact that IP platform services may be used to carry voice or other traditional forms of communication should not alter their classification as information services. IP technology can and does support a variety of end user *applications*, whose functionalities encompass those of traditional communications *services* (such as voice and data) that carriers have long provided to end users over legacy networks specially designed for those services. But when an ISP provides, for example, Internet access and the means for end users to run voice applications on top of IP functionality, the ISP does not for that reason become a "telecommunications provider," and its facilitation of voice applications is not a "telecommunications service" subject to Title II regulation. Instead, the voice applications run as part of a larger bitstream containing a variety of other applications also running on the same IP platform. In fact, it is this characteristic of the IP platform that makes it such a good vehicle for delivering information services.

It would be infeasible, and contrary to Commission precedent, to try to select out for individualized regulatory treatment any of the specific applications that customers may perform

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[87] *See* Richard Thayer *et al.*, *World Network Equipment Industry Recovery 2002-2003*, Practising Law Institute, 731 PLI/Pat 467, 500-01 & fig.21 (PLI Patents, Copyright, Trademarks, and Literary Property Course 2002).

over an IP platform service. The real power of the IP platform is that it enables the convergence of voice, data, and video. As the Commission has confirmed, the provider of IP platform services "do[es] not offer subscribers separate services — electronic mail, Web browsing, and others — that should be deemed to have separate legal status."[88] Instead, an IP platform service, including basic Internet access, is properly deemed an information service "regardless of whether subscribers use all of the functions provided as part of the service, such as e-mail or web-hosting, and regardless of whether every . . . service provider offers each function that could be included in the service."[89] Indeed, most IP platform services — particularly those used by businesses — are marketed not as traditional telephony services, but as multi-application offerings that a customer would not order (or pay for) if it sought merely a substitute for a legacy telecommunications service, as the price differentials between these products and ordinary voice telephony products illustrate.

IP platform services also have the character of private carriage, as the Commission has developed that concept.[90] As described above, the various networks and backbones that comprise the Internet are interconnected through private peering and transiting arrangements.

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88 *Report to Congress* at 11536-37 ¶ 75.

89 *Cable Modem Order* at 4822-23 ¶ 38 (footnote omitted); *see also Report to Congress* at 11543-44 ¶ 88.

90 *See, e.g., Triennial Review Order* at 17076-77 ¶ 152 ("Generally stated, a common carrier holds itself out to provide service on a non-discriminatory basis. A private carrier, on the other hand, decides for itself with whom and on what terms to deal. Common carrier status has been assessed by the Commission and the courts by the application of the two-part NARUC test: (1) whether the carrier 'holds himself out to serve indifferently all potential users'; and (2) whether the carrier allows customers to 'transmit intelligence of their own design and choosing.'") (footnotes and citations omitted).

These are commercially negotiated arrangements that differ one from another to reflect the needs of the parties and the nature of their activities. This tailor-made characteristic of many IP platform services is likely to be increasingly common in the future. For example, as described above, the proliferation of IP-VPNs will, by definition, give many such services a more private, user-tailored character, allowing end users to dictate everything from transmission paths to the degree of QoS required.

In this regard, IP platform services generally share the traits of the Internet-based services provided by cable companies. In that context, the Commission determined that any transmission services that cable companies sell to ISPs in connection with cable modem service should be deemed to fall outside the scope of "common carriage" on the ground that those companies do, and should remain free to, deal with ISPs on an individualized basis.[91] The same reasoning applies to any individualized provision of IP platform services — including Internet backbone services — to any class of customers. While such services may sometimes involve the provision of transmission directly to end users (rather than to intermediate ISPs), they represent the very sort of targeted, individualized offerings that never have been, and should not now be, regulated as traditional common carriage.[92]

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91 *Cable Modem Order* at 4829-30 ¶¶ 54-55. Notwithstanding its other holdings, the Ninth Circuit declined to second-guess that determination in *Brand X*. *See Brand X*, 345 F.3d at 1132 n.14.

92 This conclusion comports with the Commission's longstanding observation that the "public interest requires common carrier operation" of facilities only where the operator "has sufficient market power to warrant regulatory treatment as a common carrier." Memorandum Opinion and Order, *AT&T Submarine Sys., Inc.*, 13 FCC Rcd 21585, 21589 ¶ 9 (1998) (finding that a provider of a digital submarine cable system need not be regulated as a common carrier where there were sufficient alternative facilities available). As discussed, no provider — and certainly no ILEC — has disproportionate market power in the provision of IP platform services.

But classifying IP platform services as "information services" or "private carriage," by itself, may be inadequate to capture the full array of existing and potential IP-based technologies and offerings. The main consideration is not whether every conceivable IP platform service fits into one or the other of these traditional categories of unregulated services. The key factor is that IP platform services fit neither the terms nor the purposes of those legacy regulatory regimes. The Commission thus should expressly find that these services fall outside those titles and are subject only to Title I.[93]

B. The Commission Should Declare that the Computer II Requirements Do Not Apply to IP Platform Services.

The Commission also should declare that the *Computer II* unbundling requirements do not apply to IP platform services. As explained above, ensuring that IP-enabled networks are free from regulation is just as important as ensuring that IP platform services remain unregulated. Requiring providers of IP platform services to break off the transmission component of these offerings and provide them as a telecommunications service would, like the imposition of Title II regulation generally, constrain the innovation and investment that are essential to the continued development of these technologies. In fact, mandating the offering of discrete IP-based telecommunications services necessarily would extend Title II regulation to IP platforms — a result the Commission previously rejected with respect to cable modem service.

In the *Cable Modem Order*, the Commission noted that its prior decisions requiring carriers that provide information services to offer the underlying transport as a stand-alone

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[93] To the extent that IP platform services, or particular applications or components of them, may be viewed as bearing characteristics of traditional telecommunications services, the Commission should forbear from the applying Title II to them, as SBC requests in its separately filed forbearance petition.

service involved "traditional wireline common carriers providing telecommunications services (*e.g.*, telephony) separate from their provision of information services."[94] The Commission concluded that, even if *Computer II* applied in the very different context of cable modem services, its applicability should be waived, in part due to the Commission's belief that many providers would cease to provide the services that might trigger that obligation.[95] This result, the Commission found, would "disserve the goal of Section 706 that we 'encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.'"[96] Those conclusions are fully applicable to IP platform services generally, and the Commission accordingly should declare that the *Computer II* requirements do not apply to them and implement that ruling through a waiver or any other appropriate means.[97]

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94 *Cable Modem Order* at 4825 ¶ 43.

95 *See id.* at 4826 ¶ 47.

96 *Id.* at 4826 ¶ 47 (quoting 47 U.S.C. § 157(a) notes).

97 To the extent that *Brand X* suggests that there is a *statutory* requirement to isolate the transmission component of an information service and offer it separately as a telecommunications service, and to the extent that such a ruling survives further judicial proceedings, the Commission should forbear from applying such a requirement to IP platform services as advocated in the forbearance petition we have filed separately today. As explained further below, neither a declaration that IP platform services are not subject to the *Computer II* regime nor forbearance will affect the availability of legacy transport services.

C. A Declaration that IP Platform Services Are Not Subject to Title II Will Not Affect the Applicability of Title II to Legacy Telecommunications Services and Networks.

A Commission declaration limiting the scope of Title II regulation as requested herein would in no way affect existing regulation of legacy networks and services by either state or federal regulators, or predetermine the outcome of pending proceedings relating to legacy broadband services. Rather, the Commission would quite specifically be precluding the encroachment of common carrier regulation into the IP sphere, maintaining the status quo for IP platform services, and accommodating with regulatory certainty the evolution of IP network technology, services, and applications.

Two safeguards in particular ensure that a Commission determination that IP platform services must remain unregulated will have no effect on rights of access to legacy, non-IP-based services and certain of the facilities that support them. *First*, no matter what services an ILEC might provide over given facilities in its network, a CLEC would still be entitled to lease those underlying network elements that meet the standards of section 251(d)(2), as such standards are evaluated from time to time by the Commission. Thus, to the extent the Commission retains unbundling obligations for xDSL-capable loops, as an example, that obligation would continue notwithstanding a determination that IP platform services offered over that loop are unregulated. *Second*, ILECs would remain subject to the *Computer II* obligations in offering non-IP-based information services, thus ensuring unbundled access to the basic serving elements of these legacy services.[98]

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[98] As permitted by the *Computer II* framework, of course, carriers may seek and obtain relief from such obligations where appropriate. In any event, such relief pertaining to legacy services would not be a function of the relief requested in this petition.

For instance, ILECs would retain their existing obligations to provide ISPs with access to legacy, non-IP-enabled frame relay and ATM services on a common carriage basis. Likewise, ISP access rights to today's common carrier DSL transport services would be untouched by a Commission declaration that IP platform services are unregulated, because, among other things, DSL transport today is an ATM-based transmission service.

Just as relief here would not alter the regulatory framework for non-IP-based services, it would not prejudge Commission action in pending proceedings related to legacy services. In the *Broadband Non-Dominant NPRM* proceeding,[99] SBC and other ILECs seek non-dominant treatment for their broadband telecommunications services, including legacy packet transmission services such as ATM and frame relay. The record evidence in that proceeding is compelling that SBC is not dominant in the provision of such services, and the issue is ripe for consideration. But because the services at issue in that proceeding would not as a technical matter fall within the scope of the instant petition, any relief granted here would neither prejudice the outcome of the *Broadband Non-Dominant NPRM* nor alter the fundamental regulatory regime under which it will be decided. The same is true of the *Title I NPRM* proceeding,[100] in which the Commission is evaluating the appropriate regulatory framework for wireline broadband Internet access. While it is true that the proceeding could (and, indeed, should) modify the manner in which DSL transport service is regulated (such as through the modification or elimination of the *Computer II*

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[99] Notice of Proposed Rulemaking, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 16 FCC Rcd 22745 (2001) ("*Broadband Non-Dominant NPRM*").

[100] Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019 (2002) ("*Title I NPRM*").

rules as applied to such service), it will do so in isolation of the relief needed and requested here in connection with IP platform services.

In short, the framework articulated here permits the bright-line demarcation necessary to preclude Title II encroachment upon the IP sphere — and the attendant suppression of carrier investment and deployment that surely would result. Because legacy telecommunications networks and services are excluded from this petition, however, the petition in no way prejudices the Commission's ability to craft appropriate regulations for competitive access to those networks and services.

Access Charges. SBC recognizes that a decision to create an unregulated environment for IP platform services, as defined herein, could raise questions about the applicability of access charges to these services. Access charges present unique issues because of their universal service implications.

The Commission's rules, in fact, already speak directly to a number of these questions. For example, the Commission's rules do not — and never have — required the payment of access charges on services that do not touch any local exchange circuit-switched facilities of the PSTN. Conversely, as SBC has demonstrated in its filings on AT&T's access avoidance petition, when a service originates and terminates on the PSTN, access charges apply to that service under the Commission's existing rules — regardless of whether the service is transported for some distance in an IP format over an IP network between the points of origination and termination on the PSTN.[101]

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101 *See* Memorandum by SBC Communications, Inc., Urging the Commission to Deny AT&T's Access Charge Avoidance Petition, WC Docket Nos. 02-361, 03-211 & 03-266,

Some IP platform services that originate on an IP platform may be subsequently converted into a circuit-switched format for termination on the PSTN. Similarly, some circuit-switched services that originate on the PSTN may be subsequently converted to an IP format for termination over an IP platform. In these situations, access charges apply to the extent the service uses local exchange circuit-switched facilities on the PSTN. We recognize, however, that the Commission may want to consider whether its current rules provide the best means of classifying the traffic described in this paragraph for access charge purposes.[102] To the extent the Commission deems it necessary to consider any changes in its access charge rules, or the establishment of new rules, those matters should be addressed in the pending intercarrier compensation proceeding. It is only in that context that the unique issues raised by access charges can be addressed holistically and in a manner that does no harm to the Commission's longstanding commitment to the goal of universal service.

CONCLUSION

The Commission should eliminate regulatory uncertainty by confirming that IP platform services are not subject to legacy economic regulation at either the federal or state levels. To do so, the Commission should (i) reaffirm that these interstate services and networks fall within its exclusive regulatory jurisdiction under Title I; (ii) declare that IP platform services fall outside the scope of Title II and, for that matter, do not fall within any of the Act's other substantive

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attached as an exhibit to Letter from James Smith, SBC, to Michael Powell, FCC, WC Docket No. 02-361 (Jan. 14, 2004). Likewise, intrastate access charges apply to the extent such services originate and terminate within state boundaries.

102 *See supra* note 76.

titles; and (iii) declare that the *Computer II* requirements do not apply to these services.[103] The Commission can best serve the public interest in this area by establishing a regulatory clean slate and applying individual regulatory requirements as needed pursuant to the Commission's authority under Title I. Eliminating the specter of Title II regulation of the Internet and its component networks and services is the single most important step the Commission can take to foster advances in IP technology and promote the continued growth and evolution of the Internet.

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[103] The Commission also should forbear from applying Title II regulation to IP platform services, as explained in SBC's separate petition for forbearance.